



## **ISSUE**

The issue is whether appellant has met his burden of proof to establish greater than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity, for which he previously received schedule awards.

## **FACTUAL HISTORY**

On February 28, 2012 appellant, then a 53-year-old postmaster, filed a traumatic injury claim (Form CA-1) for a neck injury that occurred on February 8, 2012 due to a slip and fall on a wet floor while moving desks. OWCP accepted the claim for temporary aggravation of preexisting cervical degenerative disc disease at C4-7. After undergoing an authorized cervical surgery on April 11, 2012, appellant returned to work in a full-time, limited-duty capacity on June 19, 2012.<sup>3</sup> On May 4, 2013 he stopped work due to residuals from his accepted condition and then returned to part-time, light-duty work later on September 17, 2014.<sup>4</sup>

Appellant filed a claim for a recurrence of disability (Form CA-2a) on December 13, 2013.

OWCP referred appellant to Dr. R. Tyler Frizzell, a Board-certified neurosurgeon, for a second opinion evaluation to determine the nature and extent of his employment-related condition(s). In his September 15, 2014 report, Dr. Frizzell found that appellant's cognitive condition was not causally related to the accepted employment injury. Upon physical examination, Dr. Frizzell found that appellant's neck had no spasm and bilateral paracervical tenderness. Measuring appellant's cervical range of motion (ROM), he found 45 degrees of flexion, 10 degrees of extension, 20 degrees of lateral bending to the right, 20 degrees of lateral bending to the left, 40 degrees of rotation to the right, and 62 degrees of rotation to the left. Dr. Frizzell opined that appellant's accepted cervical condition had resulted in permanent bilateral C7 radiculopathies. He determined that appellant had reached maximum medical improvement (MMI) and opined that he was capable of working part time, four hours per day, with restrictions.

By decisions dated April 8, 2014 and January 29, 2015, OWCP denied appellant's recurrence claim, finding that the medical evidence of record was insufficient to establish that appellant had an increased disability as a result of a traumatic brain injury, causally related to his accepted work injury.

On June 23, 2015 appellant filed a claim for a schedule award (Form CA-7).

OWCP received a May 11, 2015 note from Dr. Ronald F. Baldwin, a Board-certified family practitioner, who advised that appellant had reached MMI.

---

<sup>3</sup> OWCP paid appellant wage-loss compensation for 12 hours during the period March 5, 7, and 26, 2013 and 280 hours during the period May 4 to July 12, 2013.

<sup>4</sup> In a September 30, 2013 decision, OWCP found that the postmaster position appellant had accepted on September 16, 2013 was suitable employment. The job offer provided the following restrictions: one hour of standing and walking; two hours of simple grasping.

By letter dated June 25, 2015, OWCP advised appellant that he needed to have his physician submit a permanent impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2009) (A.M.A., *Guides*).<sup>5</sup> It afforded him 30 days to submit the requested medical evidence. However, OWCP did not receive the requested evidence within the allotted time frame.

By decision dated September 11, 2015, OWCP denied appellant's schedule award claim, finding that the evidence submitted failed to meet the minimum requirements requested to determine permanent impairment.

On September 16, 2015 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. He also submitted a July 29, 2015 report from Dr. Mesfin Seyoum, a family practitioner, who found that appellant had 10 percent permanent impairment of his bilateral upper extremities under the Brachial Plexus Impairment Grid of the A.M.A., *Guides*. Dr. Seyoum found that the cervical examination showed paracervical tenderness and myospasm, greater on the right side. He also found a positive Spurling's testing bilaterally, which caused radiating pain to the upper extremities. The range of motion of the cervical spine was assessed to provide the following measurements: flexion 30 degrees, extension 40 degrees, right rotation 50 degrees, left rotation 50 degrees, right lateral bending 35 degrees, and left lateral bending 30 degrees. There was no tenderness palpable in the bilateral upper extremities, although appellant reported upper trapezial pain at extreme ranges. There was also decreased sensation and reduced motor strength in both upper extremities upon neurological examination. Dr. Seyoum indicated that appellant's most impairing diagnosis was C7 radiculopathy, as demonstrated by electromyography and nerve conduction velocity studies (EMG/NCV), under Table 15-20, A.M.A., *Guides* 435. He determined that under Table 15-7, page 406, appellant had a grade modifier of 4 for functional history (GMFH) based on his *QuickDASH* score of 82. Based on Table 15-14, page 425, Dr. Seyoum assigned a grade modifier of 1 for physical examination (GMPE) due to sensory deficit and motor weakness of 4/5. Based on Table 15-9, page 411, he assigned a grade modifier of 1 for clinical studies (GMCS) due to a positive EMG/NCV for C7 radiculopathy. Dr. Seyoum calculated a net adjustment of +3, and found five percent (grade E) right and left upper extremity permanent impairment under the sixth edition of the A.M.A., *Guides*.<sup>6</sup> Dr. Seyoum concluded that appellant had 10 percent permanent impairment of the bilateral upper extremities.

By decision dated March 14, 2016, the hearing representative vacated the September 11, 2015 decision, and remanded the case so that OWCP could refer the latest medical evidence of permanent impairment to its district medical adviser (DMA) for review.

OWCP subsequently referred the case to its DMA, Dr. Morley Slutsky, who is Board-certified in occupational medicine.

---

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>6</sup> Net Adjustment = (GMFH 4 – CDX 1) + (GMPE 1 – CDX 1) + (GMCS 1 – CDX 1). See section 15.3d, A.M.A., *Guides* 411 (6<sup>th</sup> ed. 2009).

In an April 3, 2016 report, Dr. Slutsky determined that appellant had reached MMI as of September 15, 2014 and utilized the September 15, 2014 second opinion findings of Dr. Frizzell for impairment calculations because appellant's accepted condition had stabilized at that time. He explained that Dr. Seyoum's rating was not probative because he indicated that there was 4/5 weakness in both upper extremities without discussing which muscles, with their corresponding cervical nerve roots, were involved. Dr. Slutsky further explained that Dr. Seyoum calculated appellant's impairment using the Brachial Plexus Impairment Grid, which was improper because appellant did not have a brachial plexus lesion. He rated appellant's permanent impairment based on mild bilateral C7 sensory loss, which was a class 1 class of diagnosis (CDX 1) with a default rating (grade C) of one (1) percent under *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009). Dr. Slutsky assigned a GMFH 4 based on appellant's *QuickDASH* score of 82. He did not assign a grade modifier for physical examination (GMPE). Lastly, Dr. Slutsky assigned a GMCS 1 based on the EMG/NCS evidence of C7 radiculopathy. He calculated a net adjustment of +2, and found one percent (grade E) right and left upper extremity permanent impairment under *The Guides Newsletter*.<sup>7</sup> Dr. Slutsky concluded that appellant had one percent permanent impairment of the right upper extremity and one percent permanent impairment of the left upper extremity.

By decision dated April 12, 2016, OWCP granted appellant a schedule award for one percent permanent impairment of the right upper extremity and one percent permanent impairment of the left upper extremity. The award covered a 6.24-week period February 8 to March 23, 2016.

Counsel timely requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on December 14, 2016. He challenged OWCP's reliance on Dr. Slutsky's report. OWCP did not receive any additional medical evidence regarding the extent of appellant's bilateral upper extremity permanent impairment.

By decision dated February 3, 2017, the hearing representative accepted the DMA's opinion and found that appellant had not established that he had greater than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity. Consequently, the hearing representative affirmed OWCP's April 12, 2016 schedule award decision.

### **LEGAL PRECEDENT**

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>8</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule

---

<sup>7</sup> See *id.*

<sup>8</sup> For a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

losses.<sup>9</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).<sup>10</sup>

Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.<sup>11</sup> However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.<sup>12</sup> The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve extremity impairment.<sup>13</sup> It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. The FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the procedure manual.<sup>14</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity, for which he previously received a schedule award.

Following the initial development of the schedule award claim, OWCP properly referred appellant to Dr. Frizzell for a second opinion evaluation to determine the nature and extent of his employment-related condition(s). In his September 15, 2014 report, Dr. Frizzell found that appellant's cognitive condition was not causally related to the accepted employment injury. Upon physical examination, he found that appellant's neck had no spasm and bilateral paracervical tenderness. Measuring appellant's cervical ROM, Dr. Frizzell found 45 degrees of flexion, 10 degrees of extension, 20 degrees of lateral bending to the right, 20 degrees of lateral bending to the left, 40 degrees of rotation to the right, and 62 degrees of rotation to the left. He determined that appellant had reached MMI and opined that his accepted cervical condition had resulted in permanent bilateral C7 radiculopathies.

---

<sup>9</sup> 20 C.F.R. § 10.404.

<sup>10</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

<sup>11</sup> 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); see *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5c(3).

<sup>13</sup> The methodology and applicable tables were initially published in *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition (July/August 2009). *Id.*

<sup>14</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4.

In a July 29, 2015 report, Dr. Seyoum, a family practitioner, opined that appellant had 10 percent permanent impairment of the bilateral upper extremities under the Brachial Plexus Impairment Grid of the A.M.A., *Guides*.

In accordance with its procedures, OWCP properly referred the evidence of record to its medical adviser Dr. Slutsky, who, in an April 3, 2016 report, reviewed the medical evidence of record and determined that appellant's date of MMI was November 11, 2015, the date of Dr. Frizzell's second opinion examination. Dr. Slutsky utilized Dr. Frizzell's findings for impairment calculations because appellant's accepted condition had stabilized at that time. He rated appellant based on mild bilateral C7 sensory loss, which was a CDX 1 with a default rating (grade C) of one percent under *The Guides Newsletter*. Dr. Slutsky assigned a GMFH 4 based on appellant's *QuickDASH* score of 82. He did not assign a GMPE. Lastly, Dr. Slutsky assigned a GMCS 1 based on the EMG/NCS evidence of C7 radiculopathy. He calculated a net adjustment of +2, and found one percent (grade E) right and left upper extremity permanent impairment under *The Guides Newsletter*. Dr. Slutsky concluded that appellant had one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity.

The Board finds that the DMA applied the appropriate tables and grading schemes of the sixth edition of the A.M.A., *Guides* to Dr. Frizzell's clinical findings. Dr. Slutsky's methodology and calculations were accurate. There is no medical evidence of record utilizing the appropriate tables of the sixth edition of the A.M.A., *Guides* demonstrating a greater percentage of permanent impairment. Dr. Slutsky explained that Dr. Seyoum's impairment rating was not probative because he indicated that there was 4/5 weakness in both upper extremities without discussing which muscles, with their corresponding cervical nerve roots, were involved. He further explained that Dr. Seyoum calculated appellant's impairment using the Brachial Plexus Impairment Grid, which was improper because appellant did not have a brachial plexus lesion. The Board finds that Dr. Slutsky properly applied the standards of the A.M.A., *Guides*. Dr. Slutsky's opinion represents the weight of medical evidence and OWCP properly relied on his assessment of one percent permanent impairment of the right upper extremity and one percent permanent impairment of the left upper extremity.<sup>15</sup>

There is no probative medical evidence of record, in conformance with the sixth edition of the A.M.A., *Guides*, establishing that appellant has more than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity, for which he previously received schedule awards. Accordingly, appellant has not established that he is entitled to a schedule award greater than that previously received.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

---

<sup>15</sup> See *M.T.*, Docket No. 11-1244 (issued January 3, 2012).

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish greater than one percent permanent impairment of his right upper extremity and one percent permanent impairment of his left upper extremity, for which he previously received schedule awards.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 2018  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board